UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Francis Bowen

v. Civil No. 10-cv-542-SM

Warden, New Hampshire State Prison

REPORT AND RECOMMENDATION

Francis Bowen, appearing pro se, has petitioned for a writ of habeas corpus. See 28 U.S.C. § 2254. Before me for a report and recommendation is respondent's unopposed motion for summary judgment. For the reasons that follow, I recommend that respondent's motion be granted.

Background

In 1988, Bowen was convicted of aggravated felonious sexual assault for acts he committed in 1982. He was sentenced to a term of six to fifteen years in the New Hampshire State Prison ("NHSP"). After serving his maximum sentence, he was released. In 2008, Bowen moved from the City of Franklin, in Merrimack County, to the Town of Tilton, in Belknap County, but he failed to notify the local law-enforcement agency in either municipality of his move, as was required by the New Hampshire

statute governing the registration of certain sexual offenders. See N.H. Rev. Stat. Ann. ("RSA") ch. 651-B. In March of 2008, Bowen pled guilty in Belknap County to violating RSA 651-B:4 by failing to register his move to Tilton. He was convicted, and sentenced to one to three years in the NHSP. On September 23, 2008, he pled guilty in Merrimack County to violating RSA 651-B:5 by failing to register his move from Franklin. He was convicted, and sentenced to one and one half to seven years in the NHSP, to be served concurrently with the sentence in his Belknap County case. "As a condition of parole eligibility, [Bowen] was ordered to complete the prison's intensive sexual offender program." Resp't's Mot. Summ. J., Ex. A (doc. no. 12-2), at 9.

On September 24, 2009, Bowen challenged his incarceration under the Merrimack County conviction by petitioning the Superior Court for a writ of habeas corpus. He asserted claims based on: (1) ineffective assistance of counsel; (2) double jeopardy; and (3) violation of his right to be free from cruel and unusual punishment. In an order dated March 2, 2010, Judge Smukler denied Bowen's petition for habeas-corpus relief.

On June 1, 2010, Bowen moved the Superior Court to modify the sentence he received for his Merrimack County conviction.

He argued that: (1) the trial court violated his right to due process by ordering him to complete the NHSP's sexual-offender program as a condition of parole eligibility; and (2) his conviction for failing to register as a sexual offender violated the Federal Constitution's Ex Post Facto Clause. In an order dated July 28, 2010, Judge McNamara denied Bowen's motion on grounds that the arguments therein had already been decided against him by Judge Smukler.

On October 12, 2010, Bowen filed a notice of discretionary appeal with the New Hampshire Supreme Court ("NHSC") in which he sought review of both Judge Smukler's order and Judge McNamara's order. Having missed the deadline for filing such an appeal, see N.H. Sup. Ct. R. 7(1)(C), he moved for an extension of the deadline. In an order dated November 4, 2010, the NHSC granted Bowen's motion for an extension of time but declined his notice of appeal.

On November 22, 2010, Bowen filed the petition that is currently before the court. In it, he asserts the following claim:

> Bowen's Merrimack County conviction and sentence for failing to register as a sex offender violated the prohibition against ex post facto laws, set forth in the United States Constitution, Article I, section 10, in that his underlying sex offender conviction, dating from 1988, related to conduct occurring in 1982,

> before New Hampshire had enacted any sex offender registration requirements.

Order (doc. no. 10), at 5.

The Legal Standard

Federal habeas-corpus relief may be granted "only on the ground that [a petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (1996), has significantly limited the power of the federal courts to grant habeas-corpus relief to state prisoners.

When a petitioner's claim "was adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), a federal court may disturb the petitioner's conviction only when: (1) the State court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2); or (2) the State court's resolution of the issues before it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); see also Parker v. Matthews,

___ U.S. ___, ___, 2012 WL 2076341, at *2 (June 11, 2012); Companonio v. O'Brien, 672 F.3d 101, 109 (1st Cir. 2012).

"AEDPA's strict standard of review only applies to a claim that was adjudicated on the merits in state court proceedings." Lyons v. Brady, 666 F.3d 51, 53-54 (1st Cir. 2012) (quoting Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001); citing Healy v. Spencer, 453 F.3d 21, 25 (1st Cir. 2006)) (internal quotation marks omitted). "[C]laims [that] were not adjudicated on the merits in state court [are] evaluated . . . de novo." Wright v. Marshall, 656 F.3d 102, 107-08 (1st Cir. 2011) (citing Fortini, 257 F.3d at 47 ("[W]e can hardly defer to the state court on an issue that the state court did not address.")).

Discussion

Respondent moves for summary judgment. First, he argues that Bowen's petition is untimely. Second, he contends that even if the petition were timely, it would fail on the merits. Respondent's first argument is persuasive, and dispositive.

A. Timeliness

Respondent argues that under the applicable statute of limitations, Bowen had until approximately April 1, 2010, to file his petition, which makes his November 22, 2010, filing

untimely. While respondent's calculations are a bit off, Bowen's petition is, indeed, time barred.

"A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). Because Bowen did not seek direct review of his September 23, 2008, conviction, the limitation period began to run on "the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Bowen had thirty days from the date of his sentencing to seek direct review. See N.H. Sup. Ct. R. 7(1)(C) (establishing that criminal appeals must be filed "within 30 days from the date of sentencing"). Thus, the limitation period on Bowen's right to seek habeas-corpus relief from this court began to run on October 23, 2008, which gave him until October 23, 2009, to file his petition. Bowen filed his petition November 22, 2010, approximately twenty-five months after the AEDPA limitation period had begun to run.

That limitation period, however, is subject to the following tolling provision: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation

under this subsection." 28 U.S.C. § 2244(d)(2). Respondent acknowledges that Bowen properly filed a petition for habeas-corpus relief in the state court. He did so on September 24, 2009, which was 336 days into the limitation period. Even though Bowen did not argue in his state habeas-corpus petition that his Merrimack County conviction offended the Federal Constitution's Ex Post Facto Clause, that petition was still sufficient to toll the running of the statute of limitations on the claim he has raised in the petition currently before this court. See Bishop v. Dormire, 526 F.3d 382, 384 (8th Cir. 2008); Cowherd v. Million, 380 F.3d 909, 914 (6th Cir. 2004) (overruling Austin v. Mitchell, 200 F.3d 391 (6th Cir. 1999)); Ford v. Moore, 296 F.3d 1035, 1038-40 (11th Cir. 2002); Sweger v. Chesney, 294 F.3d 506, 516-20 (3d Cir. 2002); Carter v. Litscher, 275 F.3d 663, 665-66 (7th Cir. 2001); Tillema v. Long, 253 F.3d 494, 498-502 & n.10 (9th Cir. 2001), abrogated on other grounds by Pliler v. Ford, 542 U.S. 225, 234 (2004).

Judge Smukler denied Bowen's petition for habeas-corpus relief on March 2, 2010. Respondent argues, mistakenly, that the limitation period began to run again on the date of Judge Smukler's order and expired twenty-nine days later. When the AEDPA limitation period is tolled by a petitioner's pursuit of

post-conviction or collateral review in state court, the "application for [state] post-conviction relief [remains] pending from the time it is first filed until [the time it is] finally disposed of and further appellate review is unavailable under the particular state's procedures." Drew v. MacEachern, 620 F.3d 16, 21 (1st Cir. 2010) (quoting Currie v. Matesanz, 281 F.3d 261, 263 (1st Cir. 2002); citing Bennett v. Artuz, 199 F.3d 116, 120 (2d Cir. 1999)) (internal quotation marks omitted). In the context of post-conviction or collateral review, as with direct review, final disposition comes either with "the completion of appellate review or the expiration of time for seeking such review." Currie, 281 F.3d at 266 (citing 28 U.S.C. § 2244(d)(1); Swartz v. Meyers, 204 F.3d 417, 420 (3d Cir. 2000) (ruling that application for state collateral review stopped being "pending" when time for appealing state superior court order of post-trial motion expired)).

Bowen had thirty days from the date of the clerk's notice of Judge Smukler's decision to seek appellate review of that decision. See N.H. Sup. Ct. R. 7(1)(C). He did not file a timely appeal. Consequently, the limitation period began to run again upon the expiration of the appeal period, i.e., thirty

days after the date of the clerk's notice of Judge Smukler's decision. See Currie, 281 F.3d at 266.

While neither party has provided the court with the clerk's written notice of Judge Smukler's decision, "[i]t is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand." Kowalski v. Gagne, 914 F.2d 299, 305 (1st Cir. 1990); see also Rodi v. S. N.E. Sch. of Law, 389 F.3d 5, 18-19 (1st Cir. 2004). Here, the court takes judicial notice of the fact that Judge Smukler's March 2 decision was transmitted to Bowen under cover of a notice of decision dated March 8, 2010.

Given the date of the clerk's notice of decision, Bowen had until April 7 to appeal Judge Smukler's order. On that date, which passed without a timely appeal, twenty-nine days remained in the AEDPA limitation period. That means the limitation period ran until May 6, 2010, and then expired. Because Bowen did not file his petition for a writ of habeas corpus in this court until November 22, 2010, his petition is untimely, see 28 U.S.C. 2244(d)(1), which precludes consideration on the merits and bars Bowen from the relief he seeks, see Drew, 620 F.3d at 21. To be sure, Bowen continued to seek relief in the state

courts after the period of limitation had expired, but nothing that happened in the state courts after May 6 either restarted or revived the limitation period.

On June 1, 2010, Bowen filed a motion in the Superior Court to modify his sentence. Based on Wall v. Kholi, that motion probably qualifies as an application for post-conviction or collateral review that, if timely filed, would have tolled the running of the limitation period, see 131 S. Ct. 1278, 1284-87 (2011). But, by the time Bowen filed that motion, the limitation period had already run its course, and "[o]nce the limitations period is expired, state collateral review proceedings can no longer serve to avoid the statute of limitations bar." Colbert v. Tambi, 513 F. Supp. 2d 927, 934 (S.D. Ohio 2007) (citing Rashid v. Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)); see also Trapp v. Spencer, 479 F.3d 53, 58-59 (1st Cir. 2007) (citing Cordle v. Guarino, 428 F.3d 46, 48 n.4 (1st Cir. 2005); Dunker v. Bissonnette, 154 F. Supp. 2d 95, 103 (D. Mass. 2001)). In other words, "a state court petition . . . that is filed following the expiration of the federal limitations period 'cannot toll that period because there is no period remaining to be tolled.'" Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001) (quoting Webster v. Moore, 199 F.3d

1256, 1259 (11th Cir. 2000)). Here, by the time Bowen filed his motion to modify his sentence, there was no longer any limitation period to be tolled, so that motion had no effect on the untimeliness of Bowen's petition.

More than thirty days after Judge McNamara denied Bowen's motion to modify his sentence, Bowen moved the New Hampshire Supreme Court to extend the deadline for appealing both Judge McNamara's decision and Judge Smukler's earlier denial of his petition for a writ of habeas corpus. While the NHSC granted Bowen's motion, that action did not revive the AEDPA limitation period. As the court of appeals for the Seventh Circuit recently explained: "§ 2244(d) is an independent federal rule; a state's latitude or lassitude with respect to time does not extend the AEDPA's limit." De Jesus v. Acevedo, 567 F.3d 941, 943 (7th Cir. 2009) (citing Escamilla v. Jungwirth, 426 F.3d 868 (7th Cir. 2005); Fernandez v. Sternes, 227 F.3d 977 (7th Cir. 2000)); see also Griffith v. Rednour, 614 F.3d 328, 330 (7th Cir. 2010) ("The point of Fernandez is that state courts' decisions do not have retroactive effect. Once a petition has stopped being 'pending,' nothing a state court does will make it 'pending' during the time after the federal clock began to run and before another paper is filed in state court."); cf. Drew,

620 F.3d at 22 (rejecting habeas petitioner's argument that the Supreme Court's decision Jimenez v. Quarterman, 555 U.S. 113 (2009), "indicates that in extraordinary circumstances, state court action can change how AEDPA's limitations period is tolled").

So, to sum up, the AEDPA limitation period on Bowen's claim expired on May 6, 2010. Bowen's filing of a motion to modify his sentence on June 1 did not restart the running of the limitation period. The New Hampshire Supreme Court's decision to accept Bowen's late appeal of the orders issued by Judges Smukler and McNamara did not revive the limitation period. Bowen filed his petition in this court in November of 2010. That petition was untimely.

As respondent correctly points out, the limitation period stated in 28 U.S.C. § 2244(d) "is subject to equitable tolling in appropriate cases." Holland v. Florida, 130 S. Ct. 2549, 2560 (2010) (citing, inter alia, Neverson v. Farquharson, 366 F.3d 32, 41 (1st Cir. 2004)). In Holland,

> [t]he Court established a two-prong test: "[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." [Holland, 130 S. Ct.] at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

Drew, 620 F.3d at 23 (emphasis added, parallel citations omitted). "The party seeking to invoke equitable tolling 'bears the burden of establishing the basis for it,' and must therefore establish that the circumstances are 'extraordinary' and that he acted diligently." Drew v. Superintendent, MCI-Shirley, 607 F. Supp. 2d 277, 283 (D. Mass. 2009) (quoting Neverson, 366 F.3d at 41, 42) (emphasis added). Here, Bowen has not objected to respondent's motion for summary judgment. Thus, he has not sought to invoke equitable tolling. Necessarily, he has not carried the burden of showing that he is entitled to the benefit of that doctrine.

The limitation period on Bowen's petition for a writ of habeas corpus irrevocably expired before he filed his petition in this court, and he has presented the court with no occasion to consider the application of equitable tolling. Accordingly, respondent is entitled to summary judgment, and dismissal of Bowen's petition.

B. Merits

Respondent also argues that if Bowen's petition had been timely, it would fail on the merits, even under the de novo standard of review that applies to issues that "were not adjudicated on the merits in state court." Wright, 656 F.3d at

107. While the court does not reach the merits of Bowen's claim, it observes, briefly, that respondent's argument on the merits appears to be on solid ground.

Bowen claims that because the conduct underlying his conviction for sexual assault predates the enactment of New Hampshire's sexual-offender registration statute, his conviction for violating the registration statute offends the federal constitutional prohibition of ex post facto laws. See U.S. Const. art 1, § 9, cl. 1. Bowen's claim would seem to be foreclosed by the United States Supreme Court's decision in Smith v. Doe, in which the Court upheld the Alaska sexual-offender registration statute in the face of a claim that it "constitute[d] retroactive punishment forbidden by the Ex Post Facto Clause," 538 U.S. 84, 92 (2003). Without engaging in a comprehensive analysis, the court can see nothing about the New Hampshire statute that distinguishes it from the Alaska statute in way that would cause Smith not to apply with full force to the New Hampshire statute. Thus, were it necessary to reach the merits of Bowen's claim, it is difficult to conceive of any basis in law or fact for a judgment in Bowen's favor.

Conclusion

For the reasons described above, I recommend that respondent's motion for summary judgment, document no. 12, be granted.

Any objections to this report and recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file objections within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011), cert. denied, 132 S. Ct. 1045 (2012); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010) (only issues fairly raised by objections to magistrate judge's report are subject to review by district court; issues not preserved by such objection are precluded on appeal).

Landya McCafferty
United States Magistrate Judge

June 21, 2012

cc: Francis Bowen, pro se
Elizabeth C. Woodcock, Esq.